

IN THE
MISSOURI SUPREME COURT

STATE EX REL. ZANE VALENTINE,)
Relator,)
)
)
v.)
)
THE HONORABLE MARK ORR,)
CIRCUIT JUDGE, 38TH JUDICIAL)
CIRCUIT)
Respondent.)

Case No. SC92434
Circuit Court No. 10AF-CR02140-01

Original Proceedings for Writ of Mandamus

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT AGAINST A
PERMANENT WRIT OF MANDAMUS

Jeffrey M. Merrell, Mo. Bar No. 46206
Anthony M. Brown, Mo. Bar. No. 62504
Attorneys for Respondent
266 Main Street
PO Box 849
Forsyth, Missouri 65653
Phone: (417) 546-7260
Fax: (417) 546-2376
E-Mail: tonyb@co.taney.mo.us

INDEX

TABLE OF AUTHORITIES	II
STATEMENT OF FACTS	1
POINTS RELIED ON	2
ARGUMENT	3
THE SEX OFFENDER ASSESSMENT UNIT IS NOT A ONE-HUNDRED TWENTY DAY PROGRAM UNDER SECTION 559.115.3	4
RESPONDENT SENTENCED RELATOR PURSUANT TO SECTION 559.115.2	8
CERTIFICATE OF COMPLIANCE	13

TABLE OF AUTHORITIES

Cases

<i>Riordan v. Clarke</i> , 8 S.W.3d 182 (Mo.App. W.D. 1999)	4
<i>Rupert v. State</i> , 250 S.W.3d 442 (Mo.App.2008)	8
<i>State ex rel. Chassaing v. Mummerti</i> , 887 S.W.2d 573 (Mo. banc 1994)	3
<i>State ex rel. Mertens v. Brown</i> , 198 S.W.3d 616 (Mo. banc 2006)	3
<i>State ex rel. Nixon v. QuikTrip Corp.</i> , 133 S.W.3d 33 (Mo. banc 2004)	4
<i>State ex rel. Zinna v. Steele</i> , 301 S.W.3d 510 (Mo. banc 2010)	8

Statutes

Section 217.362 RSMo	5
Section 217.364 RSMo	5
Section 217.378 RSMo	5
Section 217.541 RSMo	5
Section 217.777 RSMo	5
Section 217.785 RSMo	5
Section 559.115 RSMo	passim
Section 589.040 RSMo	5

Rules

Mo. Sup. Ct. Rule 84.06	12
-------------------------------	----

STATEMENT OF FACTS

The Respondent does not contest or dispute the Relator's statement of facts.

POINTS RELIED ON

Relator is not entitled to a writ of mandamus ordering that the Respondent, the Honorable Mark Orr, vacate his order of January 19, 2012 denying Relator probation, because the Respondent had not lost jurisdiction over Relator's case in that: (1) Respondent had placed Relator in the Sex Offender Assessment Unit (SOAU) pursuant to 559.115; (2) the SOAU is not a "one hundred twenty day program" under § 559.115.3 RSMo; and (3) that Respondent had sentenced Relator under § 559.115.2 RSMo.

State ex rel. Nixon v. QuikTrip Corp., 133 S.W.3d 33

Riordan v. Clarke, 8 S.W.3d 182

Rupert v. State, 250 S.W.3d 442

State ex rel. Zinna v. Steele, 301 S.W.3d 510

Section 559.115 RSMo

ARGUMENT

Relator is not entitled to a writ of mandamus ordering that the Respondent, the Honorable Mark Orr, vacate his order of January 19, 2012 denying Relator probation, because the Respondent had not lost jurisdiction over Relator's case in that: (1) Respondent had placed Relator in the Sex Offender Assessment Unit (SOAU); (2) the SOAU is not a "one hundred twenty day program" under § 559.115.3 RSMo; and (3) that Respondent had sentenced Relator under § 559.115.2 RSMo.

A writ of mandamus is a discretionary writ and will only lie when there is a "clear, unequivocal, and specific right." *State ex rel. Chassaing v. Mummerti*, 887 S.W.2d 573, 576 (Mo. banc 1994) (citing *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982)). A writ of mandamus is not "appropriate to establish a legal right, but only to compel performance of a right that already exists." *Id.* (citing *State ex rel. Brentwood School Dist. v. State Tax Comm'n*, 589 S.W.2d 613, 614 (Mo. banc 1979)). Although ordinarily mandamus is the proper remedy to compel the discharge of ministerial functions and not to control the exercise of discretionary powers, "[i]f, as a matter of law, the action of respondent is wrong, then he has abused any discretion which he may have had." *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. banc 2006).

Section 559.115 consists of eight subsections, two of which are relevant to this case – subsection 2 and subsection 3. Subsection 2 provides that the Court shall have the power to grant an offender probation anytime up to one hundred twenty days after the offender has been delivered to the Department of Corrections (hereinafter "the Department") – if the Court makes no decision, the offender must serve out the remainder

of his sentence. Subsection 3, on the other hand, provides that an offender can be recommended to a “one hundred twenty day program,” which is administered by the Department. If the offender successfully completes the “one hundred twenty day program,” he shall be released on probation unless the Court determines it to be an abuse of discretion to release the offender. It is noteworthy that the two subsections have different “starting times” – the one hundred twenty day period in subsection 2 begins to run on the day the offender is received by the Department of Corrections, while the period begins to run on the day of sentence under subsection 3.

**THE SEX OFFENDER ASSESSMENT UNIT IS NOT A ONE-HUNDRED
TWENTY DAY PROGRAM UNDER SECTION 559.115.3**

Unfortunately, there is no individual statute that tells us what a “one hundred twenty day program” is or how it is defined, other than its length. “The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.” *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33, 37 (Mo. banc 2004) (quoting *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)). The language of a statute is ambiguous when a key term is left undefined, requiring the court to fill in the term. *Riordan v. Clarke*, 8 S.W.3d 182, 183-84 (Mo.App. W.D. 1999). The word “program” is ordinarily defined as “a plan of action to accomplish a specified end.” (Res. Ex. A A1). While we can look at the plain letter of the law and ordinary definitions to determine intent, we can also look at other acts of the legislature. For example, the Department has several different programs and services available to its

inmates, some of which are created by specific statutes. Some of the programs offered by the Department include: “Postconviction drug treatment,” Section 217.785 RSMo, “Long term drug treatment,” Section 217.362 RSMo, “180-day drug treatment program,” Section 217.364 RSMo, “Regimented discipline program,” Section 217.378 RSMo, “House Arrest Program,” Section 217.541 RSMo, “Community corrections program,” Section 217.777 RSMo, and the “Missouri Sex Offender Program,” (or MoSOP) Section 589.040 RSMo, among others. Other programs are established on the Department’s own initiative. While the purposes of most of these programs are not explicitly stated in the accompanying statutes, all of these statutorily established programs mostly focus on *discipline, rehabilitation, and treatment* to keep offenders from reoffending and allowing them to become productive members of society once they are released from the custody of the Department.

It is the argument of the Respondent that the Relator was simply being *assessed* for a program rather than having been placed in a one hundred twenty day program. While there is nothing which explicitly tells us that the SOAU is or is not a program, there are “clues” provided by the Department in their own documentation and practices. For example, the Department suggests in its own training materials that SOAU is a means to an end – it is designed as a risk assessment, “to determine if [sic] offender can safely be managed in the community,” with “recommendations for community supervision and treatment is probation is granted.” (Res. Ex. B A19). The Department’s own Supervision Strategies and Treatment Alternatives describes the SOAU as follows:

“The Sex Offender Assessment Unit (SOAU) provides an intensive assessment in order to determine the nature and extent of psychopathology, risk for reoffending and psychological treatment needs of sex offenders. *This unit does not provide treatment.* It does assist the Court in making a decision whether to release the offender back to the community as it assesses the risk an offender poses to the community and the offender’s amenability to treatment within a community setting.” (Res. Ex. C A21-A22) (emphasis added).

Additionally, the “Court Report Investigation” done by the Board of Probation & Parole while the Relator was in the Department suggests that the SOAU is not a “program” under Section 559.115.3 RSMo. As discussed previously, the one hundred twenty day time period for an offender sentenced pursuant to subsection 3 begins when the offender is sentenced by the Court, while an offender sentenced under subsection 2 begins when the offender is received by the Department. In this case, the Relator’s Exhibit D shows that the Department calculated the Relator’s 120-day period as beginning on September 21, 2011, the day the Relator arrived in the Department, not August 25, 2011, the day the Relator was sentenced. (Rel. Ex. D A18). This report even reiterates in its conclusion that the 120th day is January 19, 2012. (Rel. Ex. D A25). Finally, the recommendation provided by the Board of Probation & Parole also seems to

indicate that, as the Respondent asserts, SOAU is just a means to an end, as it states: “With all of these considerations, Mr. Valentine seems to be amenable for treatment within his community,” (Rel. Ex. D A25) and comes up with a community based treatment plan should the Respondent have decided to release the Relator out into a community treatment and supervision center¹ and grant him probation (Rel. Ex. D A25).

Additionally, if we look at established one-hundred twenty day programs, such as the 120-day Institutional Treatment Center (ITC) and the procedures used by the Department of Corrections, those established programs are treated differently from the SOAU by the Department. For example, as seen in Respondent’s Exhibit D, when a defendant is sentenced to a 120-day ITC under Section 559.115.3, the Department of Corrections begins calculating the offender’s 120 day time period on the day of the offender’s sentence. The offender then goes to the Department and if the ITC recommends probation, they send a “Notice of Discharge,” directing the Court to take no action unless the Court wishes to execute the offender’s sentence. The SOAU **does not** follow the same procedure, as evidenced by Relator’s Exhibit D – the Relator’s 120-day time period was calculated as beginning upon his arrival to the Department. Additionally, the Court Report Investigation for the Relator asks the Court to take action if it decides to

¹ It is important to note that the recommendation of the SOAU was not “straight” probation, but rather a recommendation to the Kansas City Community Correctional Center.

award probation to the Relator, which would conversely mean that the Court need not take any action if it wants to execute the offender's sentence.

RESPONDENT SENTENCED RELATOR

PURSUANT TO SECTION 559.115.2

The Relator argues that he was sentenced under Section 559.115.3. However, the record of the plea proceedings and the Department's procedures and practices clearly contradict that. "Generally, the written sentence and judgment should reflect the trial court's oral pronouncement of sentence before the defendant." *Rupert v. State*, 250 S.W.3d 442, 448 (Mo.App.2008) (citing *State v. Patterson*, 959 S.W.2d 940, 941 (Mo.App.1998)). Where a pronouncement of sentence is ambiguous, an appellate court may examine " 'the entire record to determine if the oral sentence can be unambiguously ascertained.' " *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 514 (Mo. banc 2010) (quoting *Johnson v. State*, 938 S.W.2d 264, 265 (Mo. banc 1997)). The Respondent would respectfully submit to the Court that an examination of the entire record clarifies any ambiguity in the sentence – specifically, during the plea, the following exchange occurred between the Relator and the Respondent:

THE COURT: One other thing with regard to that plea agreement. You understand that if you are sentenced to the Sex Offender Assessment Unit under Section 559.115 they provide an assessment, and the Court retains jurisdiction over you for 120 days. Is that what you understand?

DEFENDANT VALENTINE: Yes, sir.

THE COURT: Do you understand that the – uh, regardless of whether the assessment is favorable to you or not favorable, *there is no guaranty that you will be placed on probation.* Do you understand that?

DEFENDANT VALENTINE: Yes, sir.

THE COURT: You are simply being assessed. *The Court has complete jurisdiction whether to grant probation after that period of time or not.* Is that what you understand?

DEFENDANT VALENTINE: Yes, sir. (Rel. Ex. H A53)
(emphasis added).

The Respondent would respectfully submit that in the pronouncement of the sentence, the Relator understood that it is solely within the Court’s discretion to award probation and that the Court would have to *grant* probation. “Grant” is ordinarily defined as a verb meaning, “to bestow or confer, especially by formal act.” (Res. Ex. E A28). The use of this specific word in the Court’s plea soliloquy would suggest that the Relator was actually sentenced under Section 559.115.2, as that subsection requires a specific act by the Court for the offender to be awarded probation. Additionally, the Board of Probation & Parole’s “Court Report Investigation” also suggests just that. (Rel. Ex. D A24). As

previously discussed, when compared to a 120-ITC program participant, there is an obvious difference in the language used, specifically, the “Release Plan” of an ITC participant specifically states, “[Offender] will receive a statutory discharge on his 120th date of 12/17/04,” (Res. Ex. D A26), while the Relator’s states, “Therefore, this officer respectfully recommends that Valentine be granted probation on his 120th day of 1-19-12,” suggesting further action on the Respondent’s part is necessary to award probation to the Relator. (Rel. Ex. D A25).

CONCLUSION

Respondent sentenced Relator to twenty years in the Department of Corrections under Section 559.115 and place him in the SOAU. Based off of the Department's procedures, practices, and customs, the SOAU is not a "one hundred twenty day program" under Section 559.115.3, which is obvious when compared to statutorily created programs and programs, such as the 120-ITC program, created pursuant to 559.115.3. Finally, based on the plea soliloquy, the exchanges between the Relator and Respondent and the words used in the Department's investigative reports in SOAU reports and 120-ITC reports, the Respondent sentenced the Relator under Section 559.115.2. Since the Respondent sentenced the Relator under Section 559.115.2, the Respondent did not lose jurisdiction in the Relator's criminal case until after January 19, 2012, by which time the Respondent chose to execute the Relator's sentence. Therefore, the Respondent respectfully request that this Court set aside its preliminary writ of mandamus and does not allow a permanent writ to issue.

JEFFREY M. MERRELL
Prosecuting Attorney for the County of
Taney, State of Missouri, by

/s/ Anthony M. Brown
ANTHONY M. BROWN #62504
Assistant Prosecuting Attorney
PO Box 849
Forsyth, Missouri 65653
Phone: (417) 546-7260
Fax: (417) 546-2376
E-Mail: tonyb@co.taney.mo.us

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 4th day of May, 2012, true and correct copies of the foregoing brief were e-mailed to James Egan, attorney for the Relator, at James.Egan@mspd.mo.gov.

/s/ Anthony M. Brown
ANTHONY M. BROWN #62504

CERTIFICATE OF COMPLIANCE

I, Anthony Brown, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using a combination of Microsoft Word 2007 and Microsoft Word 2011 for Mac, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 2,298 words, which does not exceed 27,900 words, the maximum allowed for a Respondent's brief.

/s/ Anthony M. Brown
ANTHONY M. BROWN #62504

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 4th day of May, 2012, true and correct copies of the foregoing brief were e-mailed to James Egan, attorney for the Relator, at James.Egan@mspd.mo.gov.

/s/ Anthony M. Brown

ANTHONY M. BROWN